[Doc. No. 8]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

BEGELMAN & ORLOW, P.C., Plaintiff, v. KRISTY L. FERARA, Defendant.	Civil No. 12-329-JHR-KMW

ORDER

This matter is before the Court on the motion of Plaintiff Begelman & Orlow, P.C., seeking to join the Internal Revenue Service, Whistleblower Office, by and through Director Stephen Whitlock ("IRS") to this matter pursuant to Federal Rule of Civil Procedure 19; and the Court noting that there is no opposition to this motion from *pro se* Defendant Kristy Ferara; and it appearing that:

1. Plaintiff brings this action alleging breach of contract, *inter alia*[1], against its former client in connection with a Retainer Agreement ("agreement") to provide legal services. (*See* First Amended Complaint ("Am. Compl."), Doc. No. 9.) Specifically, on October 29, 2007, Plaintiff entered into an agreement with

1. Plaintiff's First Amended Complaint also alleges conversion of property, unjust enrichment, quantum meruit and seeks equitable remedies of declaratory judgment and injunctive relief; establishment of a constructive trust and an attorney fee lien. (Am. Compl.)

Defendant to provide legal representation in connection with Defendant's IRS whistleblower claim pursuant to 26 U.S.C. § 7623 reporting the tax liabilities of her employer in excess of $2 million dollars. (Am. Compl. ¶¶ 1, 7-13.) Based on said report, as outlined in the statute, Defendant is entitled to a whistleblower award of at least 15 percent but not more than 30 percent of the collected proceeds or from any settlement. (*Id.* at ¶ 18.) Plaintiff claims that it is entitled to 33 1/3 % of the gross amount of the whistleblower award minus costs based upon its representation of Defendant through this process. (*Id.* at ¶ 36.)

In August of 2011, Plaintiff contends that it was informed by the IRS, pursuant to a Power of Attorney signed by Defendant permitting such communication, that the underlying tax case involving Defendant's employer had settled. (*Id.* at ¶¶ 17, 21.) Additionally, on or about December 10, 2011, the IRS notified Plaintiff that the award calculation and issuance of a Preliminary Recommendation ("recommendation") award letter-which would likely disclose the amount to be awarded to Defendant-would occur in the next month. (*Id.* at ¶ 22.) The IRS requested that Plaintiff participate in a telephone conference with the Office of Whistleblowers during the week of January 9, 2012 to discuss the recommendation. (*Id.* at ¶ 23.) Plaintiff informed Defendant of this communication and expressed its believe that the award amount would be disclosed during the telephone conference. (*Id.* at ¶ 25.) Thereafter, on January 9, 2012, Defendant sent an email to

Plaintiff indicating that she revoked the Power of Attorney with the IRS and was terminating the agreement. (*Id.* at ¶ 27.) In the email, Defendant expressed concerns with the representation provided by Plaintiff. (*Id.*) Plaintiff alleges that due to the confidential nature of whistleblower proceedings and Defendant's revocation of the Power of Attorney, it has been blocked from receiving any information with regard to the amount and/or status of the whistleblower award. (*Id.* at ¶ 30.)

2. By way of this motion, Plaintiff seeks to join the IRS to this matter pursuant to Fed. R. Civ. P. 19. (*See* Pl.'s Br. at 1.)[2] Plaintiff avers that without joinder of the IRS the Court cannot accord complete relief because the whistleblower proceedings are confidential and this matter cannot be resolved unless the IRS is subject to this Court's jurisdiction. (*Id.* at 5.) While acknowledging that the IRS is not being joined as a responsible party or to pay damages, Plaintiff maintains that joinder is necessary because the IRS holds an asset related to this matter and should be joined for purposes of directing it to deposit the whistleblower award into the Court's account.[3] (*See Id.* at 6.)

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2. Citations to Plaintiff's Brief refer to "Plaintiffs' Memorandum of Law In Support of Their Motion Pursuant to Fed. R. Civ. P. 19, To Join The IRS Whistleblower Office as a Necessary Party to This Action"," Doc. No. 8-1.

3. On January 19, 2012, Plaintiff filed a motion seeking a preliminary injunction ordering the sequestration of the award proceeds into a Court monitored account and a limitation of access to the funds; a declaratory judgment ordering that Plaintiff is entitled to thirty three and one third percent (33 1/3%) share of any and all funds received by Defendant from the IRS; and an attorney fee lien. (Pl.'s Mot., Doc. No. 3.) The Honorable Joseph H. Rodriguez, S.U.S.D.J., denied Plaintiff's motion in its entirety. (*See* Memorandum Opinion and Order, March 15, 2012, Doc. No. 21.) First, the Court found that Plaintiff had not shown that it would suffer immediate and

Plaintiff also avers that the IRS should be joined as an involuntary plaintiff because once Defendant is informed of the amount of the award she can either accept it or she can review the IRS files and comment on the amount of the award. (*Id.* at 6-8.) As such, Plaintiff argues, the relationship between Defendant and the IRS could become adversarial if Defendant chooses to, in effect, challenge the preliminary award offered. (*Id.*)

3. Federal Rule of Civil Procedure 19(a) provides that:

> (1) A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

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irreparable harm if a preliminary injunction sequestering the anticipated funds was not granted based upon the speculative nature of Plaintiff's allegations. (*Id.*) Notably, and of significant import to this current motion, the Court found that a preliminary injunction must be the only way of protecting Plaintiff from harm but the Court noted that information relating to the amount of the award and its disbursement could be ascertained through discovery. (*Id.*) Second, the Court denied the request for a declaratory judgment refusing to enter judgment as to a central and ultimate issue in the case-namely whether Defendant is obligated to pay 33 1/3% of the award to Plaintiff. (*Id.*) The Court noted that the record had not been adequately developed to make such a determination especially in light of Defendant's affirmative defense challenging the validity of the retainer agreement and Plaintiff's performance of its duties pursuant to the agreement. (*Id.*)

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a). The court must first determine whether a party should be joined if "feasible". *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 404 (3d Cir. 1993). If the party should be joined but joinder is not feasible, the court must then determine whether the absent party is "indispensable" under Rule 19(b). *Id.* If the party is indispensable, the action cannot go forward. *Id.* It is Plaintiff's contention that the Court cannot accord complete relief without joinder of the IRS based upon Rule 19(a)(1)(A).[4] The Court disagrees. A Rule 19(a)(1)(A) inquiry is "limited to whether the district court can grant complete relief to the persons already parties to the action." *Janney Montgomery Scott, Inc.*, 11 F.3d at 405. "Complete relief" does not have to be a final adjudication of all claims between the existing parties in the action as long as the relief afforded in the action is meaningful. *Bank of Am. Nat'l Trust &*

4. The Court does not find, nor does Plaintiff argue, that the IRS should be joined pursuant to Rule 19(a)(1)(B). The IRS has not claimed an interest in this action nor is there any information before the Court indicating that disposition of this action would impair or impede the IRS' ability to protect its interest or leave it at risk of incurring double, multiple or inconsistent obligations. Indeed, Plaintiff acknowledges that the IRS is not a responsible party or required to pay damages.

Sav. Ass'n v. Hotel Rittenhouse Assocs., 844 f.2d 1050, 1054 (3d Cir. 1988).

Here, Plaintiff's argument that the IRS should be joined because the IRS holds assets related to this case is unavailing and certainly does not impede the Court's ability to accord complete relief.[5] The thrust of Plaintiff's Amended Complaint and its main purpose for instituting this action is to ensure that it will receive its fee (33 1/3% of the whistleblower award) as provided by the agreement. However, the presence of the IRS in this matter has no bearing on the Court's ability to render complete relief in the form of a judgment for Plaintiff against Defendant, if Plaintiff successfully proves its entitlement to said relief. *See Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1258 n. 10 (3d Cir. 1993)(noting that a non-party is not a necessary party if complete relief can be awarded without its presence). In Plaintiff's own words, "[t]he Whistleblower Office is being joined for purposes of directing them to deposit the whistleblower award into the Court's accounts." (*See* Pl.'s Br. 6.) Thus, its absence will not affect adjudication of the claims before the Court. The Court is cognizant of the fact that Plaintiff seeks to join the IRS simply to ensure that it will receive its fee, if so ordered by the Court, as it is Plaintiff's belief that Defendant will abscond with the money once she receives it. However, Judge Rodriguez has already denied Plaintiff's

5. Based upon this finding, the Court need not consider Plaintiff's remaining arguments regarding the IRS as an involuntary plaintiff or the feasibility of joinder because they are moot.

request for injunctive relief to sequester the anticipated IRS award because Plaintiff's argument is speculative and Plaintiff was unable to show it would suffer irreparable harm. If and when, Plaintiff can establish irreparable harm, Plaintiff is entitled to move for injunctive relief, therefore, the joinder of the IRS is unnecessary.[6]

As noted above, the Court recognizes that Plaintiff is simply trying to protect its interest if it is successful in this action. While the IRS need not be joined at this juncture, it is apparent that the IRS may have information in its possession that may be both relevant and discoverable, i.e. the amount of Plaintiff's award. If so, this information can be obtained through discovery tools, as aptly noted by Judge Rodriguez.

Consequently, it is this **16th** day of **May, 2012**, hereby

ORDERED that Plaintiff's motion for joinder is hereby **DENIED**.

s/ Karen M. Williams
KAREN M. WILLIAMS
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Joseph H. Rodriguez

6. Because the IRS is not a necessary party who should be joined in the action, the Court need not determine the feasibility of the joinder. *Bank of Am. Nat'l Trust & Sav. Ass'n*, 844 f.2d at 1053-1054.